IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.136 OF 1994

1. Shobha Bhaguji Sonawane
2. Nanda Manik Pansare
3. Shobha Sambhaji Adagale
4. Kusum Vishwas Nikalje — Appellants (Org.Accused Nos.1 to 4)

Vs.

The State of Maharashtra — Respondent

Ms.Sharmila Kaushik h/f. Mr.Shirish Gupte for appellants.
Mr.B.H.Mehta, APP for State.

CORAM: S.S.PARKAR & S.R.SATHE,JJ.

October 16, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. This appeal is filed challenging the conviction of the appellants for offence under Section 302 read with Section 34 of IPC and the sentence of life imprisonment and payment of fine of Rs.300/- imposed upon them by the Addl. Sessions Judge, Pune by the judgment and order dated 4/2/1994 in Sessions Case No.342 of 1992.

2. The prosecution case as unfolded in the trial Court is as follows:

. The incident of burning of victim Suman Jadhav took place at about 9.30 a.m. on 13/2/1992 in her own

house. On the earlier day quarrel had taken place between Suman and accused no.2 Nanda. At that time Suman was beaten by all the four accused persons. On the date of incident accused no.1 and accused no.4 caught hold of Suman and kerosene was poured on her person by accused no.3 and accused no.2 Nanda lighted matchstick. Immediately after she was set ablaze Suman came out of her house and asked for help. PW 2 Anil Gaikwad extinguished her fire and thereafter she was taken to Sassoon hospital by PW 3 Jalsabai, who is sister of her husband. Jalsabai had taken her to the hospital in an auto rickshaw. On her way to the hospital on enquiry made by Jalsabai the victim told her that these four accused persons had set her on fire. After Suman was taken to the hospital doctor had recorded history of her burns given by Suman in which also she had implicated the four accused persons. Before she was taken to the hospital PW 8 had given information and particulars of the victim and how she caught fire to the constable on duty at Sassoon hospital. The said information was passed on to the head constable who in turn sent a requisition for availing the services of Special Judicial Magistrate for recording the statement of the victim in the hospital. In the statement recorded by the SJM Suman had implicated all the four accused persons. She

ultimately succumbed to her injuries. After the dying declaration was recorded police had also recorded the complaint of Suman on the basis of which crime was registered and investigation had commenced. Statements of many of the witnesses, who are neighbours, were recorded in the same evening. The accused were arrested and clothes from their persons were seized under panchanama. The clothes of the deceased were sent to the office of CA for examination. After completion of the investigation charge-sheet came to be filed and the case was committed to the Sessions Court.

3. Before the Sessions Court charges were framed against all the four accused for offences under Sections 302 and 452 both read with section 34 of IPC to which the accused pleaded not guilty.

4. On behalf of the prosecution nine witnesses were examined. PWs 1, 2 and 3 have deposed about the oral dying declaration made to them by the victim implicating the four accused. PW 4 Chandrabai Gaikwad is the panch for the arrest of the accused. PW 5 Rajaram Retawade is the Special Judicial Magistrate who has recorded the statement of the victim. PW 6 is Dr.Dinesh Phirke who had examined the patient in the hospital. PW 7 is Dr.

Laxman Pherwani who performed autopsy on the dead body. PW 8 is Namdev Gaikwad, brother of PW 2 Anil Gaikwad who had given information about the incident of suicide before Suman was admitted to the concerned ward. PW 9 is PI Jagtap who investigated the case. Defence of the accused was of false implication at the instance of PW 3 Jalsabai Kadam, sister-in-law of the deceased. Accused have examined two witnesses. DW 1 is Mahadeo Mane, Head Constable who had made entry into the Khabri book after receiving information about the incident on telephone from Constable Gaikwad and sent a requisition letter (Exh.45) to the SJM for recording the statement of Suman and also prepared a report (Exh.62). DW 2 is Dr.Shirsamkar. After considering the evidence on record the Sessions Court convicted all the four accused persons for offence under Section 302 read with Section 34 of IPC and sentenced each of them to life imprisonment and to pay a fine of Rs.300/- in default to suffer RI for nine months by the impugned judgment and order dated 4/2/1994. The said order of conviction is under challenge in this appeal filed by the four convicted accused all of whom are ladies.

5. In this case the prosecution has placed reliance on the dying declaration which was recorded on the date

of the incident between 12-30 and 12-45 p.m. on 13/2/1992 by SJM Retawade PW 5. Reliance is also placed on the evidence of PWs 1, 2 and 3 who have deposed about the oral dying declaration made to them by the victim immediately after the incident.

6. As per the evidence of PW 7 Dr.Pherwani Suman had received 2nd and 3rd degree burns to her person on her head, face, neck, chest, abdomen and back. Those burns were ante mortem. On internal examination he had noticed larynx, trache and bronchi congested. The cause of death according to him was shock and toxemia due to burns. The injuries suffered by the victim were sufficient to cause her death. The said evidence, along with the evidence of other prosecution witnesses, leaves no doubt that the victim had received burn injuries as a result of which she died. The question is whether burns were homicidal or suicidal.

7. In this respect prosecution is relying firstly on the dying declaration of the deceased recorded by the Special Judicial Magistrate PW 5 which is Exhibit 25 on record. In the said dying declaration she has stated that accused no.2 was a keep of her husband. On the earlier day in the evening quarrel had taken place

between her and accused no.2. At that time all the four accused had beaten her. On the date of the incident in the morning at about 9.30 a.m. they again beat her and accused no.3 Shobha poured kerosene on her person and accused no.2 Nanda lighted her with match stick while accused nos.1 and 4 had caught her tightly. The said statement is proved by PW 5. PW 5 had gone to the place on the basis of the requisition letter from the police for recording the dying declaration. He had received the said letter at 12-15 p.m. and, therefore, he went to ward no.27 and after making enquiry about the fitness of the patient from Dr.Phirke he recorded the statement of the victim. He has also obtained endorsement of Dr.Phirke about the fitness of the patient which is corroborated by Dr.Phirke PW 6. PW 6 Dr.Phirke, who had examined the victim asked her about the history of her burns. That time she had alleged that her neighbours i.e. accused had quarrelled with her who had burnt her. She had also told him that Nanda was the keep of her husband. He has deposed that she was conscious and well oriented and also supported the Special Judicial Magistrate for having recorded her statement. The victim Suman had died at about 10-10 p.m. in the same night.

8. Apart from the aforesaid evidence there is

evidence of PW 1 Vidya Kamble who was neighbour of Suman. She was residing in front of the house of Suman. On the date of the incident at about 9.30 a.m. when she was cleaning her utensils she saw Suman running towards the house of Gaikwad in burning condition. She however did not see anybody in the house of Suman. PW 2 Anil Gaikwad threw gunny bag on her person and extinguished fire. Then she was taken to the hospital. She has deposed that at the time her fire was being extinguished she said that all the accused caught her, beat her and burnt her. Then there is evidence of PW 2 Anil Gaikwad who was staying about 25 ft. from the house of Suman. When he was standing in front of his house at about 9.30 a.m. that day Suman came running and crying "save, save". He threw a gunny bag around her person and extinguished the fire. That time she was saying that these four accused persons set her on fire. Then Jalsabai PW 3 took her to Sassoon hospital in an auto rickshaw. She has also spoken about the quarrel having taken place on the earlier day between the accused and Suman. This witness had received burn on his finger and, therefore, he was sent to Sassoon hospital, not on the date of incident but on 15/2/1992. He has admitted in his cross-examination that he had heard that accused no.2 Nanda had illicit connection with the husband of deceased Suman. One and half hour after

the incident he had gone to Kondhapur and returned in the evening at about 4 p.m. Thereafter his statement was recorded.

9. Then there is evidence of PW 3 Jalsabai Kadam who also deposed about the oral dying declaration made to her by Suman when she was taking her to Sassoon hospital in autorickshaw. The prosecution has also led the evidence of PW 8 Namdev Gaikwad, brother of PW 2 Anil Gaikwad. He was residing jointly with PW 2 Anil Gaikwad. He was not present at the time of incident but learnt about the incident at about 10-30 or 10-45 a.m. He went to his house when no one was there in his house. Thereafter he went to Sassoon Hospital. He saw Jalsabai in Sassoon Hospital near Suman and weeping. He informed the person sitting at the counter in the hospital who was a Police Constable the name of the victim and that she had received burns. He had also told him that quarrel had taken place on the earlier day and thereafter she might have burnt. Thereafter victim was admitted to ward no.27. He was there upto 11.00 - 11.30 a.m. and when the Special Judicial Magistrate came he was asked to go away. In his cross-examination he has stated that the information given by him at the counter in the Sassoon hospital was reduced to writing. The defence has

produced on record by examining DW 1 Head Constable Mane his report (Exh.62) prepared on the basis of summary report received by him from Constable Gaikwad who was in Sassoon Hospital. In Exhibit 62 name of PW 8 Namdev Gaikwad has been mentioned as the person who had informed Dr.Shirsamkar DW 2 and he in turn told constable Gaikwad about Suman having committed suicide by burning herself. Exhibit 62 is prepared on the basis of Khabri report which was entered by Head Constable Mane on the basis of the information received from Constable Gaikwad. DW 1 Head Constable Mane has also stated that after receiving the Khabri report he prepared requisition letter (Exh.45) to Special Judicial Magistrate in which again there is mention that he had to record the dying declaration of Suman who had, as per the information, tried to commit suicide by burning herself. The defence has also examined Dr.Shirsamkar as DW 2 . He has however denied that Namdev Gaikwad had informed him that the patient had set herself on fire.

10. The question is whether the dying declaration and the oral dying declaration as deposed to by PWs 1, 2 and 3 could be believed in the face of Exhibit 45, the requisition letter and Exhibit 62, report prepared by Head Constable Mane DW 1 in which he has stated that the

information was received that Suman had poured kerosene in her own house on herself in the morning of 13/2/1992. The prosecution had kept back this report and it was produced only by the defence witness Head Constable Mane who was examined at the instance of the accused. These documents i.e. requisition letter (Exh.45) dated 13th February 1992 and report (Exh.62) prepared on the same day by Head Constable were prepared on the basis of khabri report which was not produced on record. The Head Constable Mane has categorically stated that he had prepared those two documents i.e. the requisition letter and the report on the basis of khabri report which was in turn prepared on the basis of the telephonic message given to him by Constable Gaikwad who has not been examined. This means that Khabri report itself mentions that Gaikwad had told him that Suman had poured kerosene on her person and set herself ablaze in her own house that morning. As per the said report Constable Gaikwad was given this information by Namdev Gaikwad whose name is mentioned therein. He is PW 8. As stated earlier PW 8 Namdev Gaikwad has not denied having given information of that kind to Constable Gaikwad. In his deposition he has stated that he had given name of the victim and also told the person sitting at the counter of the hospital that she had received burns. He also deposes that he had

learnt that quarrel had taken place on the earlier day and therefore she might have burnt and after he informed the person at the counter Suman was taken to ward no.27. It is admitted by DW 2 Dr.Prakash Shirsamkar that Police Head Constable and on-duty clerks work in the counter outside his chamber in Sassoon hospital. Therefore PW 8 Namdev Gaikwad must have given this information to Constable Gaikwad who has been referred to by PW 8 as the person who was sitting at the counter of the hospital. He does not deny in his evidence that he had not told the person at the counter that Suman had poured kerosene on her person and set herself on fire in her house as recorded in Khabri report and again reflected in requisition letter (Exh.45) and report (Exh.62) prepared by Head Constable Mane. It is significant to note that this information was given before Suman was admitted to ward no.27 meant for burnt patients where her history was recorded by Dr.Phirke in which she implicates the four accused persons. The recording of history was subsequent in point of time to the information given by PW 8 Namdev Gaikwad to the Constable about the suicidal attempt made by Suman. The dying declaration was recorded subsequently after 12-30 p.m. on that day. Thereafter Investigating Officer had recorded the complaint that is after 1 p.m. on that day of victim Suman and the

statements of the witnesses implicating the accused to whom the alleged oral dying declaration was made by the victim were recorded after 5 p.m. on that day. In the absence of the information given by PW 8 Namdev about the suicidal attempt on the part of Suman as reflected in requisition letter (Exh. 45) and report (Exh.62), one would be inclined to accept the evidence of PWs 1, 2 and 3 who deposed about the oral dying declaration and the dying declaration itself (Exh.25) recorded by the SJM and the complaint recorded by the police of victim Suman implicating all the four accused for homicidal burns. But the information given to the police which was first in point of time giving altogether a different story where it is stated that Suman had made suicidal attempt creates more than reasonable doubt about the truthfulness of the prosecution case as appears in the oral dying declaration deposed by three witnesses and the complaint recorded by the Investigating Officer of victim Suman. All the accused in their 313 statement have stated that they have been falsely implicated and all the witnesses have deposed against them at the instance of Jalsabai PW 3. Jalsabai is the sister-in-law of the deceased Suman. She is the sister of the husband of the deceased. It has come in her cross examination that she had filed a criminal case against brother of accused nos.1 and 4

which was compounded though she has denied the suggestion put to her that her daughter by name Chhaya had a love affair with the brother of accused nos.1 and 4. It was she who had taken Suman to Sassoon hospital alone and when PW 8 Namdev Gaikwad went to Sassoon Hospital he saw PW 3 weeping by the side of Suman. PW 2, brother of Namdev, though had helped Suman to extinguish her fire by throwing around her a gunny bag, had not accompanied her to the hospital. According to him one and half hour after the incident he had gone to Kondhapur. His brother PW 8 Namdev was not in his house at the time of incident but came to know about the incident at 10-30 a.m. i.e. one hour after the incident when he came to his house, say between 10-30 and 10-45 a.m. and then he went to Sassoon hospital. In all probability he must have been told by his brother Anil PW 2 who had extinguished the fire of Suman as to how she had caught fire on the basis of which he must have given information because he had come to his house at about 10-30 or 10-45 a.m. His brother had left one and half hours after the incident for going to Kondhapur. The possibility cannot be ruled out that the said witness had gone to Sassoon hospital along with Suman or immediately thereafter because it was he who had given information about suicide by Suman to the police. In order to circumvent the contents of

Exhibits 45 and 62 the prosecution is trying to make out a case that PW 8 Namdev had not met his brother PW 2 Anil before he had gone to the hospital and informed the police as to how Suman caught fire. Therefore, though Anil was there at the time of incident to extinguish the fire of Suman, who is said to have gone to another place and returned at 4 p.m., there was every probability of his meeting and having a talk with his brother Namdev Gaikwad who had come back home at about 10-30 a.m. on that day before he went to Sassoon hospital as Anil had left one and half hour after the incident as stated by him.

11. The aforesaid scenario shows that the word circulated in the locality was that Suman tried to immolate herself and, therefore, Namdev had informed the police about it but later on, may be at the instance of PW 3 Jalsabai who was accompanying Suman, it was decided to implicate the four accused persons who had beaten Suman on the earlier day and Jalsabai was having motive against accused nos.1 and 4. The prosecution has first of all not produced khabri report on record deliberately but in any case Head Constable, who had made entry in the khabri report, has himself stated that Exhibits 45 and 62 were prepared on the basis of khabri report according to

which Suman had poured kerosene on her person and burnt herself in her house. Secondly the prosecution has not examined constable Gaikwad. Lastly the prosecution has not explained nor disproved that the contents of Khabri report or Exh.45 the requisition letter and report (Exh.62) that Suman had poured kerosene on her person and set herself on fire was false or was imaginary. Since it was first in point of time recorded by the person not concerned with either side the duty is cast on the prosecution to explain the said entry made in khabri report on the basis of which Exhibits 45 and 62 were prepared. PW 8 Namdev Gaikwad, the brother of Anil PW 2 who has tried to support the prosecution case and the alleged oral dying declaration made to him by Suman, cannot be said to have deliberately and falsely given that report to constable Gaikwad. In any event PW 8 Namdev has not even denied that he had given such information. Duty was cast upon the prosecution to explain through Namdev in his examination-in-chief itself as to whether he had given such information and how that entry came to be made. If really Suman was taken to the hospital only by Jalsabai the police constable on duty would have enquired from Suman or Jalsabai about the cause of her burns. In all probability Namdev must have gone either along with Suman or immediately after Suman

was taken to Sassoon hospital and must have given the information about suicide on the basis of what he learnt either from Suman or Jalsabai or from his own brother Anil but later on the victim seems to have thought of implicating the four accused, may be in concert with Jalsabai PW 3, as she was beaten by the accused on the earlier day. Against two accused even Jalsabai seems to have had some grievance. The prosecution not having removed this cloud or cobweb surrounding the prosecution case, the truthfulness of the prosecution case as led before the trial Court seems to be doubtful. The four accused who had beaten Suman on the earlier day had no immediate reason to go to Suman's house next day morning to burn her. It is pertinent to note that none of the prosecution witnesses, who are from the neighbourhood, had seen any of the accused persons coming out from the house of Suman around the time of incident when Suman had come out of the house in burnt condition asking for help. Whether Suman had any reason to commit suicide or not, in view of the earlier information given to the police about the suicidal attempt on the part of Suman, the prosecution case implicating the four accused in connection with the burning of Suman is in doubt. The appellants are, therefore, entitled for the benefit of doubt and acquitted.

12. In the result, the appeal is allowed and the order of conviction and sentence recorded against the appellants by the Addl. Sessions Judge, Pune in Sessions Case No.342 of 1992 is quashed and set aside and all the appellants are acquitted. Their bail bonds shall stand cancelled. The fine amount, if paid, shall be liable to be refunded to them.

(S.S.PARKAR,J.)

(S.R.SATHE,J.)